Supreme Court, U.S.
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(1)

No. 02 876

IN THE
Supreme Court of the United States

TERESA BALLARD, ET AL.,
Petitioners,

v.

PHYLLIS GARRETT AND ADVANCE AMERICA,
CASH ADVANCE CENTERS OF ARKANSAS, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether class member objectors who were denied intervention have standing to appeal an order approving a proposed settlement agreement.

Whether a denial of such class members' right to appeal violates their rights to due process and equal protection.

PARTIES TO THE PROCEEDING

Petitioners

Petitioners are Teresa Ballard, Kenisha Bryant, and Cheryl King, individual citizens of the United States. Ms. Ballard and Ms. King reside in the State of Arkansas and Ms. Bryant resided there at the time this litigation commenced. Ms. Bryant now resides in Texas. The Petitioners have no corporate affiliations. The Petitioners were objecting class members in the Circuit Court of Clark County, Arkansas and the Appellants before the Arkansas Supreme Court.

Respondents

Phyllis Garrett is an individual citizen of the United States, residing in the State of Arkansas. Ms. Garrett was the designated class representative in the Circuit Court of Clark County, Arkansas and an Appellee before the Arkansas Supreme Court.

Advance America, Cash Advance Centers of Arkansas, Inc. ("Advance America") is an Arkansas corporation and is affiliated with numerous payday-lending entities throughout the United States. Advance America was the defendant in the Circuit Court of Clark County, Arkansas and an Appellee before the Arkansas Supreme Court.

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Petitioners respectfully petition for a Writ of Certiorari to review the judgment of the Arkansas Supreme Court in this case.

OPINIONS BELOW

The original opinion of the Arkansas Supreme Court (**App. A at 1a**) is reported at 349 Ark. 545, 79 S.W.3d 835 (2002). The opinion of the Arkansas Supreme Court denying the Petitioners' Petition for Rehearing (**App. C at 12a**) is not reported. The opinion of the Circuit Court of Clark County, Arkansas approving the proposed settlement agreement over the objection of the Petitioners (**App. B at 6a**) is not reported.

STATEMENT OF JURISDICTION

The judgment of the Arkansas Supreme Court was entered July 5, 2002. The Arkansas Supreme Court entered its order denying the Petitioners' timely Petition for Rehearing on September 5, 2002 (Glaze, J. not participating).

The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following statutory provisions:

1. U. S. Const., Amend. V. (**App. E at 21a.**)
2. U. S. Const., Amend. XIV. (**App. E at 22a.**)
3. A.C.A. § 16-11-302. (**App. E at 24a.**)
4. A.C.A. § 16-65-119. (**App. E at 26a.**)

5. ARK. R. CIV. P. 23(b) and (c). **(App. E at 27a.)**

6. ARK. R. APP. P. - Civil 2. **(App. E at 29a.)**

STATEMENT OF THE CASE

This appeal arises from an order of the Circuit Court for Clark County, Arkansas, the Hon. John A. Thomas, approving - over the Petitioners' objection - a proposed class action settlement agreement. **(App. B at 6a.)**

The case began on October 12, 1999 as a suit by Respondent Garrett against Respondent Advance America, Cash Advance Centers of Arkansas, Inc. ("Advance America"). The case was certified as a class action on April 9, 2001, simultaneous notice of certification and settlement was given on or about May 23, 2001, and the Petitioners sought to intervene on July 6, 2001, which was denied as untimely. The Petitioners timely objected to the proposed settlement agreement, which proposed to pay claiming class members and their counsel $ 750,000.00 and to forgive all "NSF" checks (with alleged value of $ 550,000.00), as being inadequate, unreasonable, and unjust.[1]

Ms. Garrett submitted financial information concerning Advance America to the Court under seal and offered that information into evidence. The Petitioners were denied an opportunity to examine that information and objected to its introduction. The Petitioners submitted evidence that the amount of potential damages awardable to the class could range between $ 10,000,000.00 and $ 20,000,000.00, that Advance America's shareholders might be jointly liable for those damages and that Advance America, that its 27

[1] Respondent Advance America admitted in its Response Brief below that the remaining NSF checks it was "forgiving" under the settlement were actually worthless to Advance America, but might have value to the class members who had already received cash for them. Petitioners responded that whatever value was represented in those checks had been conveyed independently of the proposed settlement.

sureties could be liable for a total of $ 1,350,000.00 of any such award, and that its shareholders and sureties could pay any amounts awarded at trial. The trial court quashed the subpoena Petitioners issued to Advance America.

Over the Petitioners' objection, on July 18, 2001, the trial court approved the class action settlement agreement. (**App. B at 6a.**) On August 10, 2001, the Petitioners appealed the trial court orders denying intervention and approving the settlement agreement.[2]

In their Opening Brief to the Arkansas Supreme Court, the Petitioners raised the issues of due process as applied to class action proceedings. The Petitioners stated:

> When determining whether a proposed settlement agreement should be approved, the burden is on the proponents of the agreement to show that it is fair, reasonable, and adequate. *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768 (3rd Cir. 1995). This makes sense since it is *the proponents* who allegedly possess all of the facts underlying the negotiations and who stand to benefit from the agreement. Moreover, since the proposed settlement is intended to have *res judicata* effect as to the absent class members and class counsel bears a duty toward the class, it is only right that class counsel be called upon to demonstrate that the proposed settlement was the

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[2] The trial court subsequently entered an order requiring the Petitioners to post a $ 750,000.00 supersedeas bond in the absence of any supersedeas order. The Petitioners' appeal of that order was similarly dismissed by the Arkansas Supreme Court for lack of standing and is the subject of a companion Petition for Certiorari, No. 02-426, now pending before this Court.

Petitioners also have a Petition for Certiorari, No. 02-542, pending regarding the Arkansas Supreme Court's initial adoption and application of standards by which to gauge proposed class action settlement agreements.

subject of vigorous and independent negotiation on behalf of the class.

> Due process requires nothing less. This Court has previously held that due process considerations are relevant in the class action context. *See*, e.g., *Kemp-Bradford VFW Post 4764 v. Wood*, 262 Ark. 168, 554 S.W.2d 344 (1977) ("We do not believe the rights of the members of any class, whether alcoholic beverages are involved or not, should ever be determined without reasonable notice or without evidence that parties are adequately representative of the class."); *Ford Motor Credit Co. v. Rogers*, 285 Ark. 64, 685 S.W.2d 145 (1985).

Petitioners' Opening Brief to the Arkansas Supreme Court, p. 2. This issue, as well as that of equal protection, was also implied to the Arkansas Supreme Court by the Petitioners' specific reference to *Devlin v. Scardelletti*, 536 U.S. —, 122 S.Ct. 2005, 153 L.Ed.2d 27 (2002), in Petitioners' Motion to Take Judicial Notice filed June 12, 2002 below. (**App. D at 14a.**)

On July 5 2002, the Arkansas Supreme Court dismissed the Petitioners' appeal of the order approving the settlement agreement on the grounds that they had been denied leave to intervene, were therefore not parties to the proceedings, and hence had no standing as objecting class members to appeal from that order. (**App. A at 1a.**) The court said:

> However, because we found appellants did not timely intervene, appellants do not have standing to bring this appeal. In *Devlin v. Scardelletti et al.*, WL 1270617 (June 10, 2002), the United States Supreme Court determined that unnamed class members, who have objected in a timely manner to approval of a class action settlement at the fairness hearing, have the power to bring an appeal without first intervening, abrogating the lack of standing issue. However, *Devlin* involves facts and issues that are

distinguishable from those presented by this appeal. Specifically, *Devlin* addresses a question of law and procedure arising under the Federal Rules of Civil Procedure, and not under Arkansas law. Arkansas Rule of Civil Procedure 23(b) differs from that of Rule 23(b) of the Federal Rules of Civil Procedure. In addition, the petitioner in *Devlin* did not have the ability to opt out of the settlement. Here, appellants had the ability to opt out and instead elected to object to the settlement and risk being bound by it, if approved by the court over their objections.

Accordingly, the *Devlin* opinion is distinguishable from this case on appeal, and this court's opinion in *Haberman v. Lisle*, 318 Ark. 177, 884 S.W.2d 262 (1994), continues to be the controlling precedent in Arkansas. In *Haberman*, the court found that for unnamed class members to have standing to appeal a class-action settlement in state court, those class members must have intervened at the trial court level. *Haberman, supra.* Non-parties and unnamed members of the class who have failed to intervene are precluded from appealing a class settlement. *Haberman, supra.*

Throughout this litigation, appellants have conceded that *Haberman* is the applicable and controlling law. At a hearing before the circuit court on September 5, 2001, counsel for appellants stated "[t]he Haberman decision from the Arkansas Supreme Court makes it very clear that in order for a party to appeal a settlement agreement, they must be an intervenor. That is the law." Appellants have now changed their position and suggest that *Devlin* gives them the ability to appeal the settlement approval in this case without first intervening. We disagree and continue to follow *Haberman*.

Unlike the petitioner in *Devlin*, appellants here had the ability to opt out of the settlement and avoid

being bound by it. Indeed, appellants were ideally positioned to opt out of the settlement because they already had an action pending against Advance America in federal court for the same relief as sought by the class representative in this litigation. By attempting to intervene at the last minute, rather than opting out of a settlement to which they objected, appellants willingly undertook the risk that their motion to intervene might be defied for failure to meet the requirements of Rule 24 (a) of the Arkansas Rules of Civil Procedure, and that they would then be bound by the settlement as approved by the circuit court. Appellants' strategic election not to opt out of the settlement has left them without standing to pursue this appeal. Therefore, by following *Haberman,* appellants have no standing; thus the appeal is dismissed.

Opinion of the Supreme Court of Arkansas. **(App. A at 1a.)**

The Petitioners asked the Arkansas Supreme Court to reconsider its dismissal of their appeal of the trial court's order approving the Respondents' settlement agreement **(App. F at 32a)** and that Petition for Rehearing was denied on September 5, 2002 **(App. C at 12a)**.

REASONS FOR GRANTING THE PETITION

I. The Decision of the Arkansas Supreme Court Conflicts with Recent Precedent from this Court.

The Arkansas Supreme Court unequivocally held that unnamed class members who have not successfully intervened are <u>without standing</u> to appeal a trial court order requiring them to post a supersedeas bond. The Arkansas Supreme Court said:

> However, because we found appellants did not timely intervene, <u>appellants do not have standing to</u>

bring this appeal. In *Devlin v. Scardelletti, et al.*, WL 1270617 (June 10, 2002), the United States Supreme Court determined that unnamed class members, who have objected in a timely manner to approval of a class action settlement at the fairness hearing, have the power to bring an appeal without first intervening, abrogating the lack of standing issue. However, *Devlin* involves facts and issues that are distinguishable from those presented by this appeal. Specifically, *Devlin* addresses a question of law and procedure arising under the Federal Rules of Civil Procedure, and not under Arkansas law. Arkansas Rule of Civil Procedure 23(b) differs from that of Rule 23(b) of the Federal Rules of Civil Procedure. In addition, the petitioner in *Devlin* did not have the ability to opt out of the settlement. Here, appellants had the ability to opt out and instead elected to object to the settlement and risk being bound by it, if approved by the court over their objections. (Emphasis added) **(App. A at 3a.)**

On June 10, 2002, this Court decided *Devlin v. Scardelletti*, 536 U.S. —, 122 S.Ct. 2005, 153 L.Ed.2d 27 (June 10, 2002). That case held, *inter alia*, that an unnamed class member who timely objects to the terms of a class action settlement has standing to appeal and is a "party" who may appeal. This Court's decision in *Devlin* was timely brought to the attention of the Arkansas Supreme Court by the Petitioners **(App. D at 14a)** and the issues it raised were considered and ruled upon by that court. **(App. A at 1a; App. C at 12a.)**

The decision of the Arkansas Supreme Court in this case specifically and categorically rejected *Devlin, id.* As a result, it created in Arkansas a standard for objecting class members that is not only inconsistent with *Devlin*, but (for the reasons set forth there) denies them due process and equal protection afforded under the Fifth and Fourteenth Amendments to the United States Constitution.

A. *Devlin v. Scardelletti* Applies to Classes Containing Opt-Out Provisions.

One reason given by the Arkansas Supreme Court for distinguishing this case from *Devlin* is that it involved a non-opt-out class while the class in the instant case contained an opt-out provision. In explicitly rejecting *Devlin*, the Arkansas Supreme Court said:

> ... the petitioner in *Devlin* did not have the ability to opt out of the settlement. Here, appellants had the ability to opt out and instead elected to object to the settlement and risk being bound by it, if approved by the court over their objections.
>
> * * *
>
> Unlike the petitioner in *Devlin*, appellants here had the ability to opt out of the settlement and avoid being bound by it. Indeed, appellants were ideally positioned to opt out of the settlement because they already had an action pending against Advance America in federal court for the same relief as sought by the class representative in this litigation. By attempting to intervene at the last minute, rather than opting out of a settlement to which they objected, appellants willingly undertook the risk that their motion to intervene might be defied for failure to meet the requirements of Rule 24 (a) of the Arkansas Rules of Civil Procedure, and that they would then be bound by the settlement as approved by the circuit court. Appellants' strategic election not to opt out of the settlement has left them without standing to pursue this appeal. Therefore, by following *Haberman*, appellants have no standing; thus the appeal is dismissed. **(App. A at 3a-5a.)**

With the utmost respect toward the Arkansas Supreme Court, the Petitioners believe it misconstrued *Devlin*. This Court spent only one sentence in *Devlin* referring to the

absence of an opt-out provision and did so only to emphasize the correctness of the rest of its reasoning.

This Court subsequently held on June 17, 2002 that the presence of an opt-out provision was a distinction without a difference in applying *Devlin*. See, *Henderson v. General American Life Ins. Co.*, 122 S.Ct. 2584 (Mem), 153 L.Ed.2d 773 (2002), reversing and remanding *In re General American Life Ins. Co. Sales Practices Litigation*, 268 F.3d 627 (8th Cir. 2001). This result makes sense because a class member's standing arises from the due process considerations that permit a representative to adjudicate class members' rights in the first place, not as a result of whether there is an opt out provision. See, e.g., *Hansberry v. Lee*, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22, 132 A.L.R. 741 (1940). Accordingly, the Arkansas Supreme Court's rationale on this point must be rejected.

Moreover, in granting certiorari "to resolve a disagreement among the Circuits as to whether nonnamed class members who fail to properly intervene may bring an appeal of the approval of a settlement" (*Devlin* at 2008), this Court used as an example at least one case that provided for class member opt-outs. *See, e.g., Gottlieb v. Wiles*, 11 F.3d 1004 (C.A.10 1993). This implies to Petitioners that this Court deemed the presence or absence of opt-out rights immaterial in deciding this question.[3]

B. *Devlin v. Scardelletti* Applies to State Court Proceedings.

The other reason given by the Arkansas Supreme Court for distinguishing and rejecting *Devlin* is that *Devlin* dealt with issues arising under FED. R. CIV. P. 23 while the instant case arose under ARK. R. CIV. P. 23. The court said:

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[3] Potential confusion among the Circuits is already appearing over this issue and will be discussed below.

> However, *Devlin* involves facts and issues that are distinguishable from those presented by this appeal. Specifically, *Devlin* addresses a question of law and procedure arising under the Federal Rules of Civil Procedure, and not under Arkansas law. Arkansas Rule of Civil Procedure 23(b) differs from that of Rule 23(b) of the Federal Rules of Civil Procedure.

Opinion of Arkansas Supreme Court. (**App. A at 3a.**)

That justification must also be rejected here. In the first place, this Court has held that state class action rules are subject to federal constitutional protections. *Richardson v. Ramirez*, 418 U.S. 24, 39-40, 94 S.Ct. 2655, 2664, 41 L.Ed.2d 551 (1974); *Hansberry v. Lee, supra.* That would presumably encompass both the due process and equal protection guarantees arising under the Fifth and Fourteenth Amendments. *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L.Ed.2d 799, 93 A.LR.2D 733 (1963). The federal constitutional issues of due process and equal protection were timely raised by the Petitioners and were ruled upon by the Arkansas Supreme Court, thereby allowing this Court to exercise jurisdiction in this matter. *Orr v. Orr*, 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1979).

In the second place, the Petitioners submit that the issue of one's standing to appeal a decision arising out of a state class action proceeding is not, strictly speaking, a Rule 23 procedural issue... It is an issue involving the substantive principles of due process and equal protection. Due process is involved since unnamed class members are entitled to those protections before their rights may be affected in the proceeding and equal protection is involved to the extent they are denied the right to appeal otherwise afforded to similarly situated litigants. If those rights are violated - even under a state rule of procedure - this Court may fashion a remedy.

II. The Appellate Rule of the Arkansas Supreme Court Denies Equal Protection to the Petitioners and to All Other Similarly Situated Litigants.

Petitioners have standing to petition this Court for redress of equal protection violations. See, e.g., *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville, Florida*, 508 U.S. 656, 666, 113 S.Ct. 2297, 2303, 124 L.Ed.2d 586 (1993). Even though the Petitioners have a direct interest in the outcome of this litigation, the Arkansas appellate rule in question will also affect all future objecting class members in the State and will deny them equal protection on several fronts: (1) Given their standing as unnamed, objecting class members, they will be denied appellate review that is being otherwise afforded to named parties in class action proceedings; (2) They will be denied appellate review that is being otherwise afforded to class members in non-opt-out classes; and (3) As persons whose pecuniary interests are affected by the fairness order, they will be denied appellate review afforded to non-parties in other contexts.

Named parties to a class action proceeding in Arkansas or intervenors therein are afforded access to that state's appellate courts. See, e.g., *Haberman v. Lisle*, 318 Ark. 177 884 S.W.2d 262 (1994). The Petitioners have been denied appellate review solely because they are non-intervening unnamed class members. This illustrates the anomaly inherent in this objectionable practice under Arkansas law: ARK. R. CIV. P. 23(c)(2) requires that all classes be opt-out classes, which means that all objecting class members will be denied the right to appeal (unless they have been permitted to intervene, of course) and left solely with the choice of accepting what's offered under the settlement or opting out and trying to obtain adequate relief independently of the class. At the same time, ARK. R. CIV. P. 23(c)(4) provides that the notice to them disclose that "any member who does not request exclusion may, if the member desires, participate in the litigation, either in person or through counsel", while these class members may - in the discretion of the trial court

- be denied participation "as parties", i.e., intervenors, and be denied access to appellate review.

In the broader context of non-class action proceedings, the Arkansas Supreme Court has long recognized the right of unnamed parties to appeal where their pecuniary interests are affected by an order of a lower court. See, e.g., *Ouachita Baptist College v. Scott*, 64 Ark. 349, 42 S.W. 536 (1897); *In the Matter of Allen*, 304 Ark. 222, 800 S.W.2d 715 (1990) (trial court's order directing witness to pay $ 10,000 toward care of ward exceeded court' jurisdiction); *Hodges v. Gray*, 321 Ark. 7, 901 S.W.2d 1 (1995) (attorney for party permitted to appeal criminal contempt citation against him); *Arkansas State Highway Commission v. Perrin*, 240 Ark. 302, 305, 399 S.W.2d 287, 289-90 (1996) ("No one is aggrieved except the [Highway] commission, and, whether technically a party or not in the County court, appellant certainly is the one affected by the court order. This court has long recognized the right of one who feels aggrieved by an order of a court, to appeal to a higher tribunal."); *In re $ 3,166,199*, 337 Ark. 74, 79, 987 S.W.2d 663, 666 (1999) (appeal of Arkansas Highway Patrol allowed to claim portion of res in proceeding to which it was not a named party); *McCoy v. Moore*, 338 Ark. 740, 741, 1 S.W.3d 11, 12 (1999) (appeal dismissed because not timely filed); *Dootson v. State*, 2000 WL 1745267 (Ark. App. 2000) (witness cited for contempt allowed to appeal).

This result is consistent with this Court's reasoning in *Devlin* and other cases. *See, e.g., United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76, 108 S.Ct. 2268, 101 L.Ed.2d 69 (1988). It is also consistent with extant laws of Arkansas dealing with the right of appeal. For example, Ark. R. App. P. - Civil 2 does not limit the right of an appeal to a "party." See also, A.C.A. §§ 16-11-302 and 16-65-119.

This Court has stated:

> When an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause. *Griffin v. Illinois, supra; Smith v. Bennett*, 365 U.S. 708, 81 S.Ct. 895, 6 L.Ed.2d 39 (1961); *Lane v. Brown*, 372 U.S. 477, 83 S.Ct. 788, 9 L.Ed.2d 892 (1963); *Long v. District Court of Iowa*, 385 U.S. 192, 87 S.Ct. 362, 17 L.Ed.2d 290 (1966); *Gardner v. California*, 393 U.S. 367, 89 S.Ct. 580, 21 L.Ed.2d 601 (1969). Cf. *Coppedge v. United States*, 369 U.S. 438, 82 S.Ct. 917, 8 L.Ed.2d 21 (1962); *Ellis v. United States*, 356 U.S. 674, 78 S.Ct. 974, 2 L.Ed.2d 1060 (1958).

Lindsey v. Normet, 405 U.S. 56, 77, 92 S.Ct. 862, 876 (1972).

The Petitioners are arbitrarily being denied the right to appeal otherwise afforded named class members and afforded persons whose pecuniary interests are affected solely because of their status as non-intervening, objecting class members. This misguided rule appears to be a relic of the pre-*Devlin* confusion between the Circuit Courts of Appeal on this issue that just refuses to pass away. No good reason for this disparity is evident or can withstand examination under the Fourteenth Amendment's gaze.

III. The Appellate Rule of the Arkansas Supreme Court Denies Due Process to the Petitioners and to All Other Similarly Situated Litigants.

If Petitioners are "parties" sufficiently to permit the trial court to enter an order determining their rights, they ought to be entitled to due process.

As stated above, this Court has held that state class action rules are subject to federal constitutional protections. *Richardson v. Ramirez*, 418 U.S. 24, 39-40, 94 S.Ct. 2655, 2664, 41 L.Ed.2d 551 (1974); *Hansberry v. Lee, supra* ("In all such cases, so far as it can be said that the members of the class

who are present are, by generally recognized rules of law, entitled to stand in judgment for those who are not, we may assume for present purposes that such procedure affords a protection to the parties who are represented though absent, which would satisfy the requirements of due process and full faith and credit."); *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L.Ed.2d 799, 93 A.LR.2D 733 (1963). The federal constitutional issue of due process was timely raised by the Petitioners and was ruled upon by the Arkansas Supreme Court, thereby allowing this Court to exercise jurisdiction in this matter. *Orr v. Orr*, 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1979). This Court has previously stated:

> Thus, this Court has seldom been asked to view access to the courts as an element of due process. The legitimacy of the State's monopoly over techniques of final dispute settlement, even where some are denied access to its use, stands unimpaired where recognized, effective alternatives for the adjustment of differences remain. But the successful invocation of this governmental power by plaintiffs has often created serious problems for defendants' rights. For at that point, the judicial proceeding becomes the only effective means of resolving the dispute at hand and denial of a defendant's full access to that process raises grave problems for its legitimacy." (Emphasis added.)

Boddie v. Connecticut, 401 U.S. 371, 376, 91 S.Ct. 780, 785, 28 L.Ed.2d 113 (1971).

The Petitioners were given notice of the proposed settlement and their right to object to it and be heard. They were denied the right to examine Advance America's financial information, which was central to the most important settlement factor: The amount offered in settlement compared to the potential judgment. The Petitioners' subpoena of Advance America was quashed. The balance of the evidence offered by Garrett in support of the proposed settlement was hearsay, yet it was approved in

the face of credible evidence that the case was worth far more than the settlement offered. The trial court made no specific findings of fact on the merits of the settlement from which the appellate court could determine whether there had been an abuse of discretion. Instead, the Petitioners were simply denied appellate review entirely.

In essence, the Petitioners are being denied due process because the Arkansas rules of standing are being used to subject them to obligations in its judicial system, while denying them access to the appellate courts.

IV. This Question is Important due to the Potential Split Developing in the Federal Circuits.

As discussed above, the Arkansas Supreme Court incorrectly relied on and misconstrued one sentence from this Court's decision in *Devlin* for the proposition that this Court would have decided *Devlin* differently if it concerned an opt-out class. The sentence relied upon is:

> Particularly in light of the fact that petitioner had no ability to opt out of the settlement, see Fed. Rule Civ. Proc. 23(b)(1), appealing the approval of the settlement is petitioner's only means of protecting himself from being bound by a disposition of his rights he finds unacceptable and that a reviewing court might find legally inadequate.

Devlin, 122 S.Ct. at 2011.[4]

Subsequently, this Court reversed and remanded the cases of *In re General American Life Ins. Co. Sales Practices*

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[4] This logic is no less compelling in the opt-out context where each class member holds a small claim. Objectors in such cases act for the benefit of the class no less than the named representative insofar as it is *the class* who benefits from those efforts.

Litigation, 268 F.3d 627 (8th Cir. 2001)[5] (an opt-out case), and *In re Navigant Consulting, Inc., Securities Litigation*, 275 F.3d 616 (7th Cir. 2001)[6] (opt-out status unknown) both of which involved appeals by objecting, non-intervening class members. In *General American, supra*, on remand the Eighth Circuit Court reviewed with approval the reasoning of the Arkansas Supreme Court in the instant case for the proposition that *Devlin* should not apply to opt-out classes (dismissing on other grounds), while the Tenth Circuit Court has applied *Devlin* without any attempt to distinguish it on that basis. See, *Plain v. Murphy Family Farms*, 296 F.3d 975 (10th Cir. 2002). It is apparent, therefore, that at least one Circuit Court of Appeal, the Eighth, is already tempted not to follow *Devlin* in the context of opt-out classes and that a split may already be developing.[7]

V. The Petitioners were Denied Due Process by not being Permitted to Examine Documents Presented to and Considered by the Trial Court.

When the trial court received financial information from Ms. Garrett and/or Advance America under seal, it should not have considered it for purposes of decision without giving the Petitioners an opportunity to examine it and test its authenticity, relevance, and probative value. Ms. Garrett and Advance America laid no foundation for the admission of that evidence and Petitioners timely objected to it and requested an opportunity to examine it and argue from it. The denial of that examination was a violation of the

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[5] See, *Henderson v. General American Life Ins. Co.*, 122 S.Ct. 2584 (Mem), 153 L.Ed.2d 773 (2002).

[6] See, *Grimes v. Navigant Consulting, Inc.*, 122 S.Ct. 2584 (Mem), 153 L.Ed.2d 774 (2002).

[7] The Eighth Circuit's decision in *Croyden Associates v. Alleco, Inc.*, 969 F.2d 675 (8th Cir. 1992) was the basis for the Arkansas Supreme Court's decision in *Haberman v. Lisle*, 318 Ark. 177, 884 S.W.2d 262 (1994). *Haberman* (and by implication, *Croyden)* is still the basis for the Arkansas Supreme Court's decision below.

Petitioners' due process rights. *Goldberg v. Kelly*, 397 U.S. 254, 269-71, 90 S.Ct. 1011, 1021-22, 25 L.Ed.2d 287 (1970); *Jenkins v. McKeithen*, 395 U.S. 411, 428-29, 89 S.Ct. 1843, 1852-53, 23 L.Ed.2d 404 (1969).

Given the fact that the class' underlying claims were based on violations of the Arkansas Constitution's prohibition against usury (which provides for double damages and forgiveness of outstanding debt), the contents of those records were directly relevant to the amount of damages the class might recover as well as to Advance America's ability to pay. Both of these factors are central to consideration of the adequacy of a class action settlement's terms. Moreover, to the extent those documents might reveal payment of dividends or other transfers to Advance America's shareholders, they could have shed some light on the ability of those parties to pay an eventual judgment.[8] The absence of any meaningful findings arising from the hidden financial records is further grounds for finding a violation of due process. *Goldberg v. Kelly, supra* at 271, 1022.

VI. The Question Presented is Important.

This Court has stated that it, and not the state courts, is to be the final arbiter of federal constitutional questions and may make such disposition of the case as justice requires. *State of Minnesota v. National Tea Company*, 309 U.S. 551, 557, 60 S.Ct. 676, 679, 84 L.Ed. 920 (1940).

The rule adopted by the Arkansas Supreme Court as to non-intervening objecting class members eliminates their access to the appellate courts of the State for <u>all</u> purposes and will affect their rights in all future class litigation. The fact that the Arkansas Supreme Court's opinions dismissing

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[8] Advance America's shareholders and sureties were released under the settlement agreement even though they had not been sued and contributed nothing toward the settlement fund. Petitioners argued this result was inequitable to the class.

the Petitioners' appeals of the trial court orders approving the settlement agreement and ordering a supersedeas bond have been designated for publication demonstrates that court's intention to apply those decisions in future class action litigation. Moreover, those decisions ignore completely the denial of due process resulting from the Petitioners' preclusion from examining Advance America's financial information.

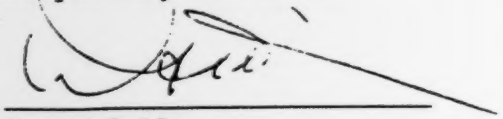
Objecting class members or class members subjected to other orders of the trial court cannot predict with any certainty whether they will be allowed to intervene and yet they will continue to be subject to orders affecting their property or liberty interests. If intervention is allowed to remain as the key to the Arkansas Supreme Court's chambers, these class members' due process and equal protection rights will be granted or denied in the discretion of the trial court. Petitioners, in No. 02-542, have also requested this Court to ensure that there be objective standards by which to judge the exercise of such discretion. These rights should be absolute and assured to all who are affected by those proceedings.

CONCLUSION

If the Petitioners, who timely objected to the proposed settlement and appealed from the order approving it, have enough standing for due process to permit a trial court to enter its order determining their property rights and cutting off their ability to sue non-parties (Advance America's shareholders and sureties), it is a denial of due process to deny them an opportunity to be heard on appeal. Moreover, since the courts of Arkansas permit appeals by named class members and defendants in class actions and by non-parties whose pecuniary and liberty interests are implicated by a trial court's order in other settings, the Petitioners and all future objecting class members are being denied equal protection under the law if they are arbitrarily denied the same rights of appeal.

The Petitioners respectfully request this Court to enter its order reversing and remanding these proceedings to the Arkansas Supreme Court for proceedings in conformity with this Court's ruling.

Respectfully Submitted:



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APPENDIX

The Appendix is in a separate volume submitted herewith.